

No. SC87778

**IN THE
MISSOURI SUPREME COURT**

FRANK JONES,

Plaintiff/Appellant,

v.

GAYE LYNN FIFE,

Defendant/Respondent.

**Appeal from the Grant of Summary Judgment
in a Declaratory Judgment Action by the
Circuit Court of Pike County, Missouri
The Honorable Dan Dildine, Presiding**

**RESPONDENT'S SUBSTITUTE BRIEF
ON POST-OPINION TRANSFER FROM THE
MISSOURI COURT OF APPEALS EASTERN DISTRICT**

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JURISDICTIONAL STATEMENT

The Missouri Court of Appeals Eastern District transferred this case following opinion. This case is a declaratory judgment action involving the issue of whether a change in statutory law should be applied retroactively to reduce mandatory-minimum prison terms on offenses for which an inmate was convicted and sentenced before the new law became effective. Specifically, the Court of Appeals mentions an apparent conflict between *State v. Lawhorn*, 762 S.W.2d 820 (Mo. banc 1988), which found changes in statutory law that had the effect of reducing mandatory-minimum prison terms to be substantive and not applicable retroactively, and *State ex rel. Nixon v. Russell*, 129 S.W.3d 867 (Mo. banc 2004), which held a provision concerning judicial parole to be procedural and therefore retroactively applicable.

STATEMENT OF THE CASE

There are no genuinely disputed issues of material fact in this case. The Department of Corrections has calculated that Frank Jones has four prior commitments to the Department of Corrections before his most recent receipt on November 14, 2001, for service of an eleven year sentence imposed by the Circuit Court of St. Louis City on November 9, 2001, for felony stealing in case 001-1839 (L.F. 145). The Department calculates that Jones, therefore, must serve a mandatory-minimum prison term of eighty percent of his most recent prison sentence under §558.019, RSMo 2000 because Jones has three or more prior commitments to the Department of Corrections (L.F. 145).

Jones agrees that he has been received by the Department of Corrections on four prior occasions but asserts that two of those incarcerations should not count as commitments under §558.019, RSMo because those prior receipts were for a 120-day treatment program under §559.115, RSMo and long term drug treatment under §217.362, RSMo. Jones asserts that §559.115.7, RSMo 2003 (Cum. Supp.) and §217.362.5, RSMo 2003 (Cum. Supp.), which remove a first reception for treatment under these programs from the definition of commitments, should be applied retroactively to reduce his prior commitment count from four to two and his mandatory-minimum prison term from eighty percent to fifty percent (L.F. 10-11).

The Circuit Court found this argument to be legally incorrect and granted summary judgment for the defendant (L.F. 174-175).

Therefore the issue in this case is whether §217.362.5, RSMo 2003 (Cum. Supp.) and §559.115.7, RSMo 2003 (Cum. Supp.) should be applied retroactively to reduce the mandatory-minimum prison term on an offense committed before and for which an offender was sentenced before the effective date of those statutes by reducing the number of commitments.¹

¹ In the trial court Jones also argued that incarcerations under §559.115, RSMo and §217.362, RSMo were not commitments because those were “regimented discipline programs” exempted from being counted as commitments under §217.378, RSMo (L.F. 9-12). Jones does not make that argument on appeal (See Appellant’s Brief).

STATEMENT OF FACTS

Frank Jones was first received by the Department of Corrections on October 30, 1986 to serve a criminal sentence in case 861-00934 for receiving stolen property (L.F. 10, 27, 135). The Department of Corrections counts that receipt as a prior commitment one on Jones most recent sentence in case 001-1839 for which Jones was received to serve an eleven year sentence on November 14, 2001 (L.F. 29).

Jones returned to the Department of Corrections on April 23, 1990 to serve a new sentence in case 891-2687 for felony stealing (L.F. 10, 27, 135). The Department of Corrections counts this receipt as prior commitment two on Jones' most recent sentence (L.F. 29).

On July 22, 1994, Jones again returned to the Department of Corrections. This time he received sentences in cases 931-1210 and 931-2989 for receiving stolen property, sale of a controlled substance and second degree burglary, which included a treatment program under §559.115, RSMo (L.F. 10, 27, 135). Jones was released on probation after the 120-day treatment program on February 1, 1995 (L.F. 12). The Department of Corrections counts this incarceration as prior commitment three on Jones' most recent sentence (L.F. 29).

Jones again returned to the Department of Corrections on August 4, 1996 as a probation violator on case 931-2989 and with a new sentence in case 961-0410A (L.F. 15-16, 29). Jones received long term drug treatment under §217.362, RSMo on all sentences (L.F. 15-16, 29). The Department of Corrections counts this incarceration as prior commitment four on Jones' most recent sentence (L.F. 29).

Jones committed felony theft on April 9, 2000 in St. Louis City, was convicted and sentenced on November 9, 2001 in case 001-1839, and was returned to the Department of Corrections with an eleven year sentence on November 14, 2001 (L.F. 119). The Department of Corrections calculates that Jones has four prior commitments on this sentence requiring Jones to serve a mandatory-minimum prison term of eighty percent of the sentence prior to parole eligibility as §558.019, RSMo 2000 requires this for inmates with three or more prior commitments to the Department of Corrections (L.F. 29, 119-120).

Jones challenged this calculation in a declaratory judgment action in the Circuit Court of Pike County, Missouri asserting that only the October 30, 1986 and April 23, 1990 incarcerations should count as commitments under §558.019, RSMo 2000 and that he should only have a mandatory-minimum prison term of fifty percent on his most recent sentence (L.F. 9-13).

The Circuit Court of Pike County granted summary judgment for Respondent on August 29, 2005, finding that there are no genuinely disputed issues of material fact, and that the 1994 and 1996 incarcerations should count as commitments under §558.019, RSMo 2000 (L.F. 174-175). Jones filed a timely notice of appeal on September 21, 2005 (L.F. 2) following opinion the Missouri Court of Appeals Eastern District transferred the case to this Court.

ARGUMENT

I.

The Circuit Court of Pike County acted correctly in granting summary judgment for the Respondent because there are no genuinely disputed issues of material fact between the parties, and the Department of Corrections acted correctly under Missouri statutory law in determining that Jones has at least three prior commitments to the Missouri Department of Corrections requiring him to serve eighty percent of his most recent sentence prior to eligibility for parole.

The Issue in the Case

Jones is an inmate in the Missouri Department of Corrections who is required to serve eighty percent of his most recent sentence as a mandatory-minimum prison term because Jones has three or more prior commitments to the Department of Corrections under §558.019, RSMo 2000, which requires an eighty percent mandatory-minimum prison term for inmates with three or more prior commitments. Jones asserts that two of the commitments, a 1994 receipt for a 120-day program under §559.115, RSMo and a 1996 receipt for long term drug treatment under §217.362, RSMo, after his probation was revoked on the 1994 sentences and he received a new sentence, should be removed, and he should only be required to serve a fifty percent mandatory-minimum prison term. Jones received long term drug treatment on the sentences on which his probation was revoked and on the new sentence. Jones reasons that §559.115.7, RSMo 1993 (Cum. Supp.) and §217.362.5, RSMo 2003 (Cum. Supp.), which became effective on June 27, 2003, and remove a first

incarceration for a 120-day treatment program and a first incarceration for long term drug treatment respectively from the definition of commitments under § 558.019, RSMo, should be applied retroactively to remove these two commitments. Jones asserts this even though his most recent offense and sentence occurred before the June 27, 2003 effective date of §559.115.7, RSMo 2003 (Cum. Supp.) and §217.362.5, RSMo 2003 (Cum. Supp.).

STANDARD OF REVIEW

There are no disputed issues of material fact in this case. The parties agree on the dates and number of times Jones was received into the Department of Corrections. The case turns on the legal issue of whether §559.115.7, RSMo 2003 (Cum. Supp.) and §217.362.5, RSMo 2003 (Cum. Supp.) should be applied retroactively to remove two of Jones' commitments and reduce Jones' mandatory-minimum prison term from eighty percent to fifty percent. This is a purely legal issue and review is *de novo*.

Analysis of the Retroactivity of §559.115.7, RSMo 2003 (Cum. Supp.) and §217.362.5, RSMo 2003 (Cum. Supp.)

This Court has held that it violates the Missouri Constitution to apply a law retroactively unless the legislature manifested a clear intent that the law be applied retroactively, or the statute is procedural only and does not affect any substantive right of the parties. *State ex rel. St. Louis-San Francisco Ry. Co. v. Buder*, 515 S.W.2d 409, 410 (Mo. banc 1974) construing Article I §13 Mo. Const. 1945. In addition, §1.160, RSMo 2000 provides an explicit statutory ban on the reduction of the punishment or penalty for an

offense by the repeal or amendment of a statute after sentencing for the offense. That statute reads as follows:

1.160. Effect of repeal of penal statute. -

No offense committed and no fine, penalty or forfeiture incurred, or prosecution commenced or pending previous to or at the time when any statutory provision is repealed or amended, shall be affected by the repeal or amendment, but the trial and punishment of all such offenses, and the recovery of the fines, penalties or forfeitures shall be had, in all respects, as if the provision had not been repealed or amended, except:

(1) That all such proceedings shall be conducted according to existing procedural laws; and

(2) That if the penalty or punishment for any offense is reduced or lessened by an alteration of the law creating the offense prior to original

sentencing, the penalty or punishment shall be assessed according to the amendatory law.²

In *State v. Hillis*, 748 S.W.2d 694, 697-698 (Mo. App. E.D. 1988), the Court of Appeals held that a change in §558.019, RSMo that occurred after an inmate committed the offenses for which he was sentenced could not be retroactively applied to require the inmate to serve a mandatory-minimum prison term of eighty percent. The Court of Appeals concluded that parole eligibility constituted part of the punishment for an offense even if it was not technically part of the sentence and the change affected the inmate's substantive rights. *Id.* The Court of Appeals relied on *Lindsey v. Washington*, 301 U.S. 397 (1937) in which the United States Supreme Court found that increasing a minimum term that must be served from six months to fifteen years substantially disadvantaged an inmate.

In *State v. Lawhorn*, 762 S.W.2d 820, 824-826 (Mo. banc 1988) this Court addressed an argument by an inmate that changes in §558.019, RSMo made after he committed his offense, which increased the mandatory-minimum prison term on that offense, could not be applied to him retroactively consistent with the Missouri and United States Constitutions. Relying on *Hillis* and several United States Supreme Court and United States Court of Appeals decisions, this Court agreed with the inmate that the length of a mandatory-

² Section 1.160, RSMo was modified in 2005 by removing the provision stating that an inmate is to receive the benefit created by a change in the law creating the offense that becomes effective before sentencing. That change is not material to this case.

minimum prison term involved a change in a substantive right, and the term therefore could not be increased by a law passed after the date of the offense. *Id.*

The conclusion that §559.115.7, RSMo 2003 (Cum. Supp.) and §217.362.5, RSMo 2003 (Cum.Supp.) cannot be applied retroactively to decrease the mandatory-minimum prison term for an offense committed before the statute became effective flows necessarily from the *Lawhorn* and *Hillis* decisions. *Lawhorn* teaches that an increase in a mandatory-minimum prison term is an increase in punishment and affects substantive rights. *State v. Lawhorn*, 762 S.W.2d at 824-826. Therefore, logically a decrease in a mandatory-minimum prison term must be a decrease in punishment and must also be substantive. Jones asks that his mandatory-minimum prison term for an offense he committed and for which he was sentenced prior to the effective date of §559.115.7, RSMo 2003 (Cum. Supp.) and §217.362.5, RSMo 2003 (Cum.Supp.) be reduced based on retroactive application of those statutes. That cannot occur consistent with the decision in *Lawhorn*, which teaches that the type of change that occurred in this case is substantive. The general Missouri rule is that substantive changes in the law cannot be applied retroactively absent the manifestation of a clear intent by the legislature, which is neither present nor alleged to be present in this case. *See State ex rel. St. Louis-San Francisco Ry. Co.*, 515 S.W.2d at 410.

Section 558.019.9, RSMo 2003 (Cum. Supp.) states that the provisions of the new version §558.019 are only to be applied to offenses committed after August 28, 2003. Therefore, not only is there an absence of clearly manifested legislative intent that changes in mandatory-minimum prison terms are to be applied retroactively, there is a manifest intent

that such changes not apply retroactively. In fact, there is a strong argument that §559.115.7, RSMo 2003 (Cum. Supp.) and §217.362.5, RSMo 2003 (Cum. Supp.) must be read in *pari materia* with §558.019.9, RSMo 2003 (Cum. Supp.) and are controlled by the date of application language of that provision, which states that the provisions of 558.019, RSMo 2003 (Cum. Supp) apply only to offenses committed after August 28, 2003. *See State v. Tivis*, 948 S.W.2d 690, 696-697 (Mo. App. W.D. 1997) (finding that an inmate could not benefit retroactively from the removal of burglaries from the list of dangerous felonies subject to mandatory-minimum terms by §556.061(8), RSMo 1994 because that provision is controlled by the date of application language in §558.019.7, RSMo 1994 with which it must be read in *pari materia* which states that provisions of §558.019, RSMo 1994 apply only to offenses committed after August 28, 1994).

This argument provides an alternative and more specific reason for affirming the trial court's decision. As §559.115.7, RSMo and §217.362.5, RSMo were passed at the same time and as part of the same bill - S.B. 5 (2003), as §558.019, RSMo and are meaningless without that provision, the sections should be read in *pari materia*. Further, §1.160, RSMo 2000 prohibits the retroactive application of the amendment or the repeal of a law that decreases punishment for crime.³

³ Respondent believes §1.160, RSMo should control. But the result is the same under the default rule that substantive laws are not to be given retrospective application or under the more specific analysis that §559.115.7, RSMo 2003 (Cum. Supp) and §217.362, RSMo

Therefore, the trial court should be affirmed for any of the following reasons:

- 1) Sections 217.362.5, RSMo 2003 (Cum. Supp) and 559.115.7, RSMo 2003 (Cum. Supp) have substantive effect and therefore cannot be applied retroactively under Article I, §13 of the Missouri Constitution which prohibits retrospective laws.
- 2) Sections 217.362.5, RSMo 2003 (Cum. Supp) and 559.115.7, RSMo (Cum. Supp) must be read in *pari materia* with §558.019.9, RSMo passed as part of the same bill which explicitly limits the changes in §558.019, RSMo 2003 (Cum. Supp) to the offenses committed after August 28, 2003.
- 3) Section 1.160, RSMo 2000, which prohibits retroactive reductions in punishment controls the fact pattern in this case and prevents retroactive reduction of Jones' mandatory-minimum prison term.

2003 (Cum. Supp) should be read in *pari materia* with §558.019, RSMo 2000 (Cum. Supp). In *State v. Sumlin*, 820 S.W.2d 487, 490 (Mo. banc 1991) the Missouri Supreme Court held that the Missouri Legislature typically amends statutes by repealing old provisions and enacting new ones and such an action is an amendment to a statute within the meaning of §1.160, RSMo. *But see State ex rel. Nixon v. Russell*, 129 S.W.3d 867, 870 (Mo. banc 2004) (appearing to distinguish between the addition of a new paragraph to a statute and the modification of language in an existing paragraph in the context of whether a change is an amendment within the meaning of §1.160, RSMo 2000).

The Missouri Court of Appeals has in a series of recent decisions retroactively applied §559.115.7, RSMo 2003 (Cum.Supp.), which became effective June 27, 2003, to reduce mandatory-minimum prison terms on offenses committed before the effective date of §559.115.7, RSMo 2003 (Cum.Supp.). Section 559.115.7, RSMo 2003 (Cum.Supp.) is analogous to §217.362.5, RSMo 2003 (Cum.Supp.) except that the former statute excludes short term 120-day treatment programs, as opposed to long term treatment programs from being counted as commitments. Some of the decisions retroactively applying §559.115.7 RSMo 2003 (Cum.Supp.) are *Irvin v. Kempker*, 152 S.W.3d 358 (Mo. App. W.D. 2004); *Powell v. Missouri Department of Corrections*, 152 S.W.3d 363 (Mo. App. W.D. 2004); *Scott v. Missouri Department of Corrections*, 152 S.W.3d 372 (Mo. App. W.D. 2004); *Nieuwendaal v. Missouri Department of Corrections*, 181 S.W.3d 153 (Mo. App. W.D. 2005), and *Carlyle v. Missouri Department of Corrections*, 184 S.W.3d 76 (Mo. App. W.D. 2005).

In *Irvin* the Missouri Court of Appeals, Western District found that §559.115.7, RSMo 2003 (Cum. Supp.) should be applied retroactively to remove a mandatory-minimum prison term. The *Irvin* court relied on *State ex rel. Nixon v. Russell*, 129 S.W.3d 867 (Mo. banc 2004) in which this Court retroactively applied a statute permitting judicial, as well as executive parole for certain offenders. *Irvin v. Kempker*, 152 S.W.3d at 360-361.

In *Nieuwendaal* the Missouri Court of Appeals found that the general rule in Missouri is that statutes are to apply prospectively only unless the legislature has manifested a clear intent that the law is to be applied retroactively or the statute is solely procedural and does

not affect substantive rights. *Nieuwendaal vs. Missouri Department of Corrections*, 181 S.W.3d at 155. The Missouri Court of Appeals, Western District acknowledged in *Nieuwendaal* that there was no indication that the General Assembly intended §559.115.7, RSMo 2003 (Cum.Supp.) to apply retroactively but concluded that the provision should be applied retroactively anyway, because it is purely procedural. *Id.* at 155.

In *Carlyle*, the Missouri Court of Appeals acknowledged that *Lawhorn* holds that changes in mandatory-minimum prison terms are substantive as opposed to procedural. *Carlyle v. Missouri Department of Corrections*, 184 S.W.3d at 79. The *Carlyle* court, however, determined that it must conclude that *Lawhorn* had been overruled *sub silentio* by *State ex rel. Nixon v. Russell*, 129 S.W.3d 867 (Mo. banc 2004), which the *Carlyle* court characterized as holding that "new statutes affecting the minimum time served in prison are merely procedural and can be retroactively applied." *Id.*

Respondent respectfully disagrees with the Court of Appeals' interpretation of *Russell* and its application of *Russell* to mandatory-minimum prison time cases. *Russell* has no application in the mandatory-minimum prison term context.

Russell was not a case that had anything to do with increasing or decreasing mandatory-minimum prison terms. In *Russell*, the inmate sought retroactive application of a statute, §558.016.8 RSMo 2003 (Cum.Supp.), which allows a sentencing judge to grant judicial parole to nonviolent C and D felons with no prior commitments after the inmates have served 120 days. *State ex rel. Nixon v. Russell*, 129 S.W.3d at 870-871. What the inmate in *Russell* sought and received was an additional procedure and an additional decision

maker in the parole process. He did not become eligible for parole one day sooner than he otherwise would have been as he had no prior commitments and no statutory mandatory-minimum prison term. *Id.* at 871; *see Gettings v. Missouri Dept. of Corrections*, 950 S.W.2d 7 (Mo. App. W.D. 1997) (noting that the Parole Board need not follow regulatory guidelines for the range in which an inmate should be paroled because these are necessarily merely an aid to the Board and cannot limit the Board's statutory discretion to grant parole when and if it feels this is appropriate).

In short the statute applied retroactively in *Russell* was procedural and had nothing to do with the holding in *Lawhorn* that changes in a mandatory-minimum prison term are substantive. *Russell* and *Lawhorn* do not conflict and *Russell* did not silently overrule *Lawhorn*. The cases exist harmoniously without conflict.

When *Russell* is not read expansively to conflict with *Lawhorn*, as it should not be, *Lawhorn* controls the fact pattern in this case. When that is accepted as correct it necessarily follows that the ban on retrospective laws in Article I, §13 of the Missouri Constitution prevents the retroactive application of §217.362.5, RSMo 2003 (Cum. Supp) and §559.115.7, RSMo 2003 (Cum. Supp) to reduce Jones' mandatory-minimum prison term as that would be a retroactive change in substantive right - i.e. a retrospective law.

Therefore, the trial court's decision in this case is compelled by *Lawhorn* and *Hillis*, and is necessarily correct and should be affirmed. There is a public policy reason for not retroactively reducing punishments by legislation. That is §1.160, RSMo 2000 and Article I, §13 of the Missouri Constitution promote predictability and finality in judicial decisions

by allowing prosecutors, defendants and sentencing courts to have a reasonable ability to predict what the resolution of a criminal case means, and to expect that the result will not be unintentionally changed by future legislation.

A habitual criminal with three prior commitments who is sentenced to twenty years in prison may be understood to be required to serve at least sixteen-years in prison. But if the definition of a commitment is changed at some future date with the retroactive effect no one can know what punishment may be expected from the twenty-year sentence for a habitual criminal. The people of Missouri and the inmates of Missouri have their substantive rights changed in a way contrary to Article I, § 13 of the Missouri Constitution and a punishment is reduced in violation §1.160, RSMo 2000 when §559.115.7, RSMo 2003 (Cum. Supp.) is applied retroactively. In short, the purpose of these provisions support the analysis that §559.115.7, RSMo, 2003 (Cum. Supp.) should not be applied retroactively to reduce existing mandatory-minimum prison terms.⁴

The trial court acted correctly and should be affirmed.

⁴ Presumably, a removal of certainty that habitual criminals will serve at least a specified portion of their sentences in prison could lead to longer total sentences. That would seem to be a less efficient system than providing certainty that a specific minimum term will be spent in prison. Also in the long run, longer sentences would defeat the original point of using the sections prospectively to reduce prison populations by removing certain narrowly defined individuals from the prison population sooner.

CONCLUSION

The decision of the Circuit Court of Pike County should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b) and contains 4,134 words, excluding the cover, this certification and the appendix, as determined by WordPerfect 9 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this ____ day of August, 2006, to:

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RESPONDENT'S APPENDIX

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